BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 98-496-C - ORDER NO. 1999-224

MARCH 29, 1999

IN RE:	Petition of South Carolina Cable Television Association for a Declaratory Order Concerning the Leasing of Dark Fiber Optic Facilities.	))))	DECLARATORY ORDER

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina ("Commission") on the petition of the South Carolina Cable Television Association ("Cable Association") for a declaratory order. In its petition for the declaratory order the Cable Association asks that this Commission make rulings concerning the lease of unused fiber optic capacity or "dark fiber" to another company or entity that will add the electronics that are used to activate or "light" the fiber, which make it capable of transmitting voice or data traffic directly to the public. Specifically, the Cable Association seeks a ruling that the leasing of these individual strands does not make the entity which owns and leases such fibers a "telephone utility" pursuant to §58-9-10(6) S.C. Code Ann. (1976) and that the entity leasing these fibers is therefore not subject to regulation by this Commission. Intervening in this proceeding were the Consumer Advocate of South Carolina, BellSouth Telecommunications, GTE South, Inc., United Telephone Company of the Carolinas, and the South Carolina Telephone Coalition

("Telephone Coalition"). A hearing was held on this matter on February 10, 1999, in the Commission's hearing room. The Honorable Philip Bradley, chairman, presided. The Cable Association was represented by Frank R. Ellerbe, III, Esquire and Karlyn Stanley, Esquire; the South Carolina Telephone Coalition was represented by John M. Bowen, Jr., Esquire and Margaret M. Fox, Esquire; the Consumer Advocate was represented by Elliott F. Elam, Jr., Esquire; and the Commission Staff was represented by its General Counsel F. David Butler, Esquire. Intervenors BellSouth, United Telephone and GTE did not participate in the hearing.

In support of its petition the Cable Association presented the testimony of Barry Wilson, its Treasurer and the President of the South Carolina Division of Time Warner Cable, as well as the testimony of Richard Cimerman, who is the director of State Telecommunications Policy for the National Cable Television Association. The Cable Association also asked the Commission to take judicial notice of certain prior proceedings and matters in this Commission's files which will be discussed subsequently in this order. The Telephone Coalition prefiled testimony in opposition to the Cable Association's petition but withdrew its witness prior to the hearing. The Telephone Coalition introduced certain exhibits on cross examination, but otherwise presented no evidence in support of its position. No other party submitted any testimony or exhibits.

The Cable Association's petition for declaratory ruling asks this Commission to address the application of South Carolina law to a specific factual situation. In support of its request the Cable Association has presented testimony generally describing ways in which its members use fiber optic cable and why fiber optic cable is available to be leased by other entities for other purposes. These matters do not appear to be the subject

of a factual dispute. Instead, the parties differ on how this Commission should construe §58-9-10(6). Accordingly, in its findings of fact, this order will explain the factual background upon which this Commission bases its conclusions of law concerning construction of that statutory provision.

II. FINDINGS OF FACT

1. The Cable Association is a non-profit corporation, organized and existing pursuant to the laws of the state of South Carolina, representing over 100 franchised cable television systems operating within South Carolina. Its member cable television companies are regulated by local government entities which issue franchises pursuant to §58-12-30 S.C. Code Ann. (Supp. 1997).

2. The Cable Association initiated this proceeding in an effort to obtain a ruling from this Commission on the ability of members of the Cable Association to lease "dark fiber" without being considered to be telephone utilities under §58-12-10(6). The term "dark fiber" was explained by Cable Association witness Wilson as being a part of the cable company's fiber optic systems.

Within a fiber optic cable are tubes which contain individual glass fibers through which information is transmitted using light waves as the carrier. Any of these individual strands within the fiber optic cable which is not in use is referred to as "dark fiber". The "dark" refers to the fact that that fiber is not in use and is therefore not lit by the light pulses which electronically transmit information. Tr. p. 10.

Mr. Wilson also explained that cable television companies use fiber optic cable in their systems because the fiber optic cables provide a number of advantages in the providing of cable television service. In particular the fiber optic cables permit the

companies to enhance system capacity and to reduce signal degradation, both of which permit stronger, clearer television reception to be delivered to customers. Tr. p. 11.

Both Cable Association witnesses testified concerning the reasons why cable television companies have excess fibers available to be leased as dark fibers. Mr. Wilson explained that "In the process of installing fiber optic lines as part of our systems, we typically install fiber optic cables with considerably more capacity than we have need for immediately." Tr. p. 12. Mr. Wilson also testified that it is much more cost effective for cable companies to build systems with fiber optic cables having more capacity than the cable companies have immediate need for. He explained that additional capacity does not increase installation costs significantly, and therefore prudent companies install considerably more capacity as a way of planning for future business expansion. Tr. p. 17. Mr. Cimerman also explained that it is advantageous not only to cable companies but also to the public to build additional capacity because it requires less activity in public rights-of-way. Tr. p.65.

As a result of the economic factors described by Mr. Wilson and Mr. Cimerman, it is clear to this Commission that many cable companies operating in this state have excess fiber optic fibers - dark fibers - which have been installed by the cable companies for legitimate business purposes but which are presently available for possible uses by other entities.

3. Dark fiber by itself is, by definition, incapable of transmitting information. It is only when the dark fibers are attached to electronic devices at either end that the fibers can be "lit" in order to be used for telecommunications. Tr. p. 66. The electronic devices translate information into light pulses and then transmit those pulses through the

fibers. Tr. p. 10. The Cable Association does not ask this Commission to address a situation in which a cable company is providing fiber and electronics. The only issue before us is the providing of dark fiber alone.

4. The Cable Association has asked this Commission to issue a declaratory ruling concerning two situations in which a cable television company can lease dark fiber without that company becoming a telephone utility under §58-9-10(6). The first of these situations is the leasing of dark fiber to an entity for its internal use only with no resale being made to the public. The second situation is a lease of dark fiber to a certified telecommunications carrier which then uses the dark fiber to provide telecommunication services.

Based on the Cable Association's petition for a declaratory order and on the testimony of its two witnesses, this Commission has been asked to make a narrow ruling dealing only with dark fiber with no associated electronics being provided by cable companies in two specific situations: a) to private entities for internal use only; or b) to certificated telephone utilities under the jurisdiction of this Commission.

III. CONCLUSIONS OF LAW

This Commission concludes that a cable television company leasing dark fiber either to an entity for its internal use or to a regulated telephone utility does not by leasing such dark fiber become a telephone utility as that term is defined in §58-9-10(6), S.C. Code Ann. (1976). This conclusion is based on the language of the statute, longstanding precedent concerning the definition of "common carriers", industry practices, and sound public policy.

A. A Telephone Utility is a "For Hire" Common Carrier.

In this decision the Commission construes the following statutory definition: The term "telephone utility" includes persons and corporations, their lessees, assignees, trustees, receivers or other successors in interest owning or operating in this state equipment or facilities for the transmission of intelligence by telephone for hire, including all things incident thereto and related to the operations of telephones. §58-9-10(6), S. C. Code Ann. (1976) (emphasis supplied). This provision has existed in South Carolina law since Act 1026 of 1950 which was the original legislation that brought telephone companies under the jurisdiction of the Public Service Commission. The definition of "telephone utility" has not since been amended.

The statutory language uses the term of art "for hire," which has long been used to denote a common carrier. See Nationwide Insurance Co. v. New Amsterdam Casualty Co., 376 F.2nd 607 (4th Cir. 1967). A common carrier "has the duty to furnish service to all customers alike, and to charge them uniform rates therefore." Miller v. Central Carolina Telephone Co., 194 S.C. 327, 336 S.E.2d 355 (1940) citing State *ex rel.* Gwynn v. Citizen's Telephone Co., 61 S.C. 83, 39 S.E. 357 (1901). By its use of the term of art "for hire" the South Carolina General Assembly clearly intended to grant this Commission jurisdiction over common carriers. The question at issue in this proceeding is whether, by leasing its dark fiber in a very limited way, a cable television company should be deemed to be a "common carrier".

The Cable Association presented testimony through Mr. Cimerman that "under Federal law, where cable companies are regulated under Title VI, they are not a common carrier." Tr. at 82, lines 1-3. He also testified that under Federal law, cable companies

are not regulated as "telecommunications carriers" under the Act. Specifically, Mr. Cimerman testified that the Act further defines the term "telecommunications service" as meaning "the offering of telecommunications for a fee *directly to the public*, or to such classes of users as to be effectively available to the public, regardless of the facilities used. Cimerman prefiled Testimony at 6-7 (emphasis supplied). Mr. Cimerman further testified that, when cable companies lease dark fiber, they are not providing anything "directly to the public." Instead, he said, "cable companies lease dark fiber primarily to common carriers, not to members of the public." Prefiled testimony at 7.

The issue of "common carriage" has been addressed with respect to transportation common carriers.

> One who undertakes, not to carry persons or property, but merely to furnish the means of conveyance to another, is not a common carrier. For example, sleeping car companies which furnish sleeping cars to railroad companies are not considered to be common carriers unless they are given the status of common carriers by constitutional or statutory provisions. Similarly, one who merely furnishes railroad companies with special types of cars such as refrigerated cars for carrying perishable fruits, is not considered to be a common carrier. Those engaged in the business of renting out motor vehicles without drivers - that is, those operating "drive it yourself" systems - are not considered to be common carriers. 13 Am. Jur. 2d, Carriers, §18.

> In holding that a company that leased refrigerator cars to railroads was not a common carrier, the United States Supreme Court noted that the company has no control over motive power or the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in § 1 of the act includes such instrumentalties as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, - not that the owners and builders should be regarded as carriers, contrary to the truth. The control of the Commission over private cars, etc., is to be effected by its control over the railroads that are subject to the act.

Ellis v. Interstate Commerce Commission, 237 U.S. 443, 443-444 (1914).

A cable company which leases dark fiber for use by others in providing telecommunications is exactly like the companies which lease trucks to motor carriers or railroad cars to railroads. Mr. Cimerman cited the distinction between transportation providers such as Allied Van Lines and U-Haul. He said, "if I hire Allied Van Lines to move my household goods, they may be regulated, whereas if I go in and rent a U-Haul, that's not regulated." Tr. at 104, lines 6-17. The entity which obtains the truck or the railroad car or the dark fiber and uses those facilities to offer services "for hire" to the public is the common carrier subject to regulation. Thus, under traditional regulatory concepts, it is clear that the leasing of dark fiber does not make a cable television company a "for hire" common carrier. Accordingly, a cable company leasing its excess dark fiber to other entities is not a telephone utility subject to the jurisdiction of this Commission.

B. A ruling that an entity leasing dark fiber is not a telephone utility is consistent with industry practices in this state.

While this Commission has never specifically ruled on the question presented in this case, many of the long standing practices in the telecommunications industry are consistent with the conclusion which this Commission has reached concerning the leasing of dark fiber. An excellent example of such a practice was described by Cable Association witness Cimerman in his testimony concerning the leasing of telephone switches. Mr. Cimerman pointed out that Lucent Technologies both sells and leases switches. Tr. p. 77. These switches are then incorporated by telephone utilities into their systems and are used to carry telephone traffic. Without the availability of the switches,

calls could not be completed. However, this Commission has never regulated an entity like Lucent which leases switches which are then used by telephone utilities. A cable television company leasing dark fiber which is then used by another entity to carry telecommunications traffic is indistinguishable from a company like Lucent leasing a switch to another entity which is then used to carry telecommunications traffic.

Two other examples of industry practices consistent with the position advanced by the Cable Association were explained in a hearing before this Commission in 1989. That hearing, which the Cable Association asked this Commission to take judicial notice of, took place in Docket No. 88-445-C on the petition of PalmettoNet Inc. for a clarification of its authority. PalmettoNet is now and was in 1989 a certified carrier's carrier which operates a fiber optic network providing service to various points and places in the state of South Carolina. In 1989 PalmettoNet was owned by 11 independent local exchange companies, all of which are presently members of intervenor Telephone Coalition. In the course of the 1989 proceeding, representatives of PalmettoNet (both of whom were also officers or employees of companies which are members of the Telephone Coalition) testified that PalmettoNet obtained some of its fiber optic lines by leasing those lines from a company called MPX. 1989 Tr. p. 29.[1] Those witnesses also testified that MPX was a subsidiary of SCANA which had installed fiber optic system as part of its electricity transmission and distribution system. However, in 1989, at the time of the hearing requested by PalmettoNet, neither MPX nor SCANA had obtained from the South Carolina Public Service Commission a certificate to operate as a telephone

[1]Citations in this order to the hearing transcript in Docket No. 88-445-C are denoted "1989 Tr."

utility in this state, and MPX did not obtain certification until 1996. See Order No. 96-451 dated July 5, 1996, in Docket No. 96-089-C. In the same hearing in 1989, representatives of PalmettoNet testified that in some parts of the state PalmettoNet leased fiber optic lines from its member/owners, the rural local exchange companies. However, none of these rural local exchange companies have provisions in their tariffs providing for leasing fiber optic lines nor have any contracts between those rural local exchange companies and PalmettoNet ever been filed with this Commission for approval.

The record in the 1989 proceeding strongly supports this Commission's conclusion in the present proceeding. The Cable Association has asked this Commission to hold that when one of its members leases dark fiber, that company is not telephone utility regulated by this Commission. What the Cable Association asks for is to be treated exactly like MPX was treated in 1989. Like SCANA and MPX, the cable companies have additional fiber optic lines, originally installed for other purposes, which can be useful in providing telecommunications services. PalmettoNet and its rural local exchange company owners apparently had no objection to MPX making its fiber lines available. Their protest in the present case is, therefore, inconsistent with their past conduct and unpersuasive to this Commission. It is also significant that this Commission heard testimony in 1989 describing situations in which entities were leasing fiber optic lines to a certified telecommunications carrier and treating those leases as unregulated activities. No action was taken by this Commission to assert jurisdiction over those activities at that time. It is clear that this Commission, and others in the telecommunications industry in this state, held a view of these transactions consistent

with that urged by the Cable Association, that an entity leasing dark fiber is not a telephone utility.

C. Public Policy Considerations.

There are important public policy considerations which support the Commission's decision in this matter. The Commission believes that this ruling will encourage the availability of additional facilities which can be used to provide telecommunications services to many locations in the state of South Carolina. As Mr. Wilson testified, allowing entities to obtain dark fiber to be incorporated into systems for internal communications will allow educational institutions to implement distance learning projects. Tr. p. 14. The availability of fiber optic facilities to educational institutions is especially important in rural areas of South Carolina. While it is clear that cable companies do not necessarily have facilities in all corners of the state and that facilities available may not be suitable for use, the Commission believes that its decision in this proceeding will certainly make it more likely that fiber optic facilities are available, especially in rural areas.

The Commission also concludes that its decision in this proceeding will make it more likely that competitive telecommunications carriers will have facilities available to enable them to be more competitive in offering telecommunications services in the state. Cable Association witness Cimerman explained that the transmission capacity that dark fiber represents offers an opportunity to new telecommunications competitors in South Carolina, such as MFS. Rather than having to build new facilities, including digging up the streets to lay new fiber, a new entrant like MFS can lease facilities to provide telecommunications voice or data services. This saves the new entrant precious capital,

which can then be expended on marketing and customer service. When marginal costs are reduced, a new entrant can afford to offer quality service at lower prices in order to challenge the incumbent. Tr. p. 68.

The Commission understands that one of the important ways in which CLECs can be competitive is to obtain their own facilities to offer telecommunications services to their customers. While building their own facilities may be cost prohibitive, leasing such facilities may be a feasible way for a CLEC to become a facilities-based provider of telecommunications services. The decision in this proceeding will make it more likely that such facilities are available and will therefore be helpful to the development of competition in this state.

D. Intervenors' Objections.

The Commission is not persuaded by objections raised by the intervenors to the declaration sought by the Cable Association. Neither the Consumer Advocate nor the Telephone Coalition called any witnesses to explain how the public or any existing telephone utility could be injured. Similarly, no issues raised on cross examination suggest ways that cable companies leasing dark fiber could cause harm.[2] Instead, the Telephone Coalition and the Consumer Advocate on cross examination raised two issues which do not appear to provide a basis for refusing the relief sought by the Cable Association.

There has been some confusion concerning whether, if dark fiber had been determined to be "an unbundled network element" in arbitration proceedings pursuant to

[2]Indeed, the record suggests that similar arrangements have been beneficial in allowing PalmettoNet to become a competitive "carriers' carrier" in this state. See Section II(B) above.

the Telecommunications Act of 1996, that should affect the Commission's decision in this proceeding. Mr. Cimerman explained in his testimony before the Commission that the Telecommunications Act itself holds the answer to this question. Tr. at 75, lines 1-20. He explained that the Act laid out different responsibilities for different kinds of carriers. *Id* Section 251 of the Act, which concerns interconnection, imposed some obligations on all carriers, additional obligations on local exchange carriers, and yet greater obligations on incumbent local exchange carriers. *Id.* As he pointed out, only incumbent local exchange carriers have to make unbundled network elements available to competitors. *Id.* There is no obligation for competitive local exchange carriers, no obligation for other types of carriers, and no obligation for cable companies that are not otherwise in the telecommunications business to make unbundled network elements available. *Id.* During arbitrations pursuant to the Act, state commissions were asked to make a very specific determination concerning interconnection responsibilities of incumbent local exchange carriers. The provision of unbundled network elements was one of those responsibilities. We concur with Mr. Cimerman's conclusion that "the fact that this Commission has ruled that unbundled network elements have to be made available by BellSouth or GTE, which are incumbent local exchange carriers, should have no bearing on what happens to a cable company that is not in the telecommunications business." *Id.*

The intervenors also suggest that the relief sought by the Cable Association should be denied because it would allow arrangements similar to the joint venture recently announced between AT&T and Time-Warner. The Telephone Coalition introduced a document entitled "Investment Community Briefing" authored by AT&T

and Time-Warner which outlines the agreement. See Intervenors' Exhibit 1. We understand that this document is not necessarily binding and is only a management projection of the way the arrangement is expected to operate. Nevertheless, for our purposes we are assuming the project would go forward as described. Under this arrangement the Time Warner cable plant would be used by an AT&T-Time Warner joint venture to provide telephone services. The joint venture entity would be regulated as a telephone utility by this Commission and would, in part by leasing dark fiber from a cable company, be able to provide facilities-based competition in this state. As discussed above, the public interest is served where CLECs are able to effectively compete. Because this Commission will have regulatory authority over the joint venture entity - the "telephone utility" - we are satisfied that the arrangement will not allow anyone involved to evade any legal or regulatory obligation or responsibility. Similarly, we are persuaded that common carriers that lease dark fiber from cable companies would be subject to the proper oversight of this Commission. For these reasons, the proposed transaction between Time-Warner and AT&T provides no basis for refusing to grant the requested declaratory relief.

IV. CONCLUSION

For the foregoing reasons the Commission grants the petition of the Cable Association and issues the following declaratory ruling: that an entity that owns and provides (i.e., leases) dark fiber, without electronics to "light" the fiber, will not be subject to regulation by the Commission under Chapter 9 of Title 58 of the South Carolina Code of Laws. Because of this conclusion, we also hold that any entity who currently provides the aforementioned service on a regulated basis shall have the

opportunity to seek approval from this Commission to provide the service on a non-regulated basis.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)